Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. — 79-2

WARDEN, Illinois State Penitentiary, Stateville Correctional Center, and ATTORNEY GENERAL of Illinois,

Petitioners,

vs.

LEROY HAIRSTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

The petitioners, Warden, Illinois State Penitentiary, Stateville Correctional Center, and Attorney General of Illinois, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 30, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix A hereto. The opinion of the District Court, not yet reported, appears in the Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 30, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in giving retroactive application to this Court's decision in *Wardius* v. *Oregon,* 412 U.S. 470 (1973).

STATUTORY PROVISIONS INVOLVED

Illinois Revised Statutes, Chapter 38: § 114-14 Notice of Alibi Defense.

> Upon request of the prosecuting attorney . . . whenever a defendant proposes to offer in his defense, testimony of witness other than himself to establish an alibi, such defendants [sic] shall, not less than 5 days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense and the names and addresses of the witnesses whom the defendant intends to call to establish such alibi defense. If the defendant intends to offer an alibi by his own testimony he shall, not less than 2 days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi, which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense. The defendant shall not be permitted to introduce evidence inconsistent with such notice unless the defendant establishes to the satisfaction of the court that witnesses to be called and not named in the notice were not known at the time such notice was filed or the court for other good cause permits the notice to be amended. In the event of the failure of a defendant to file written notice as required in this Section, the court may exclude evidence offered by the defendant for the purpose of proving an alibi, if it appears to the court that such evidence takes the State by surprise.

STATEMENT OF THE CASE

The respondent, Leroy Hairston, was convicted of murder following a jury trial in the Circuit Court of Cook County, Illinois, and was sentenced to a term of 75-100 years. On direct appeal, the Illinois Appellate Court affirmed the conviction in *People* v. *Hairston,* 10 Ill. App. 3d 678 (1st Dist. 1973). The respondent's petition for leave to appeal was denied by the Illinois Supreme Court. 54 Ill. 2d 594.

Subsequent to the Illinois Appellate Court's decision, but while respondent's Petition for Leave to Appeal was pending in the Illinois Supreme Court, this Court handed down its decision in *Wardius* v. *Oregon,* 412 U.S. 470 (1973), in which it held unconstitutional an alibi-notice statute, similar to the one found in the present case, on the ground that it failed to provide reciprocal disclosure of alibi rebuttal witnesses by the prosecution.

The respondent filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois on April 4, 1975. In the Petition, respondent asserted that his trial had been tainted by pretrial publicity, and that the Illinois notice-of-alibi statute then in effect had denied him a fair trial. On respondent's motion for summary judgment, the Court granted the writ as to the alibi-notice issue on the basis of *Wardius* v. *Oregon, supra.*

The petitioners appealed, and the Seventh Circuit reversed the District Court's decision because the State court record did not show that respondent was harmed by application of the alibi notice statute, and the case was remended for determination of the issue of pre-trial publicity. On December 5, 1977, that petition was denied.

Respondent moved for reconsideration of the alibi-notice issue, but that motion was also denied.

On September 8, 1977 the respondent filed a second Petition for Writ of Habeas Corpus, seeking renewed consideration of his claim that the application of the alibi-notice statute had denied him a fair trial. On February 28, 1978 the District Court ruled that this was a proper case for successive habeas corpus petitions since the claim had not been given a full and fair hearing on the first petition. On April 14, 1978 a hearing was held on the respondent's alibi-notice claim, and on August 25, 1978 the District Court granted relief upon respondent's Second Petition for Writ of Habeas Corpus.

Petitioners appealed this decision to the Court of Appeals for the Seventh Circuit, arguing in part that this Court's decision in *Wardius* v. *Oregon, supra,* ought not to be given retroactive application, but on April 30, 1979 the Seventh Circuit affirmed the decision of the District Court, and held specifically that *Wardius* was to be applied retroactively.

REASON FOR GRANTING THE WRIT

WARDIUS SHOULD NOT BE GIVEN RETROACTIVE APPLICATION

Criminal proceedings against this respondent began in 1968, and *Wardius* was not decided until 1973, four years after respondent's trial had concluded. The decision of the Court below is the only reported case granting retroactive application to *Wardius*. In so holding, the decision of the Court below is in direct conflict with two other well-reasoned decisions which granted *Wardius* prospective application only, *Mayer* v. *Moeykins*, 373 F. Supp. 649 (D. Vt. 1973), and *Commonwealth* v. *Oliver*, 329 A. 2d 309 (Penna Super. Ct. 1976). In *Mayer*, the District Court stated:

> "The Wardius decision does not indicate that it is to be applied retroactively, and, in the absence of a showing of prejudice we are most reluctant to apply it so as to reverse a conviction obtained prior to the date of that decision."
> (373 F. Supp. at 654)

The decision below is also in conflict with the numerous decisions of this Court which refused to grant retroactive application to new constitutional rules not affecting the very integrity of the fact-finding process. *Linkletter* v. *Walker*, 381 U.S. 618 (1965), which declined to give retroactive effect to the exclusionary rule of *Mapp* v. *Ohio*, was the first in a long line of cases giving prospective effect to rules newly propounded in the field of constitutional criminal procedure.

It was direct authority for cases like *Williams* v. *United States*, 401 U.S. 646, 91 S. Ct. 1148, 28 L. Ed. 2d 388 (1971) and *Desist* v. *United States*, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969), where the Court limited to prospective effect the Fourth Amendment interpretations of *Chimel* v. *California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 685 (1969), and *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1968). New decisions relating to criminal procedure grounded in the Fifth and Sixth Amendments were limited in retroaction by an analysis akin to that made in *Linkletter*. *Adams* v. *Illinois*, 405 U.S. 278, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1972); *Mackey* v. *United States*, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971); *DeStefano* v. *Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308 (1968); *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); *Tehan* v. *Shott*, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966).

These decisions show a clearly-defined trend in this Court to grant retroactive application *only* in those cases where the new rule is substantive or jurisdictional, i.e., where its practical result is to prevent a trial from taking place at all; those cases that merely prescribed procedural rules that govern the conduct of a trial have been granted only prospective application. See the majority opinion of Mr. Justice Rehnquist explicating this differential treatment in *Robinson* v. *Neil*, 409 U.S. 505, at 509 (1973).

This Court stated its criteria for determining whether a decision should be applied retroactively in *Stovall* v. *Denno*, 388 U.S. 293 (1967):

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."
> (388 U.S. at 297).

After applying the *Stovall* criteria, it is clear that *Wardius* should not be applied retroactively, nor should it be applied with "limited retroactivity" to cases such as the present one which was pending on direct appeal at the time the new procedural rule was first stated.

As to the first criterion, the purpose of *Wardius* was not to correct a procedural defect tending to corrupt or falsify the fact-finding process. This Court did not condemn the practice of requiring a defendant to reveal his alibi defense prior to trial. Rather this Court held that if such revelations are required of the defendant, the statute must provide reciprocal discovery rights to the accused as a matter of fairness. *Wardius* thus propounded a new rule of disclosure or discovery. While the petitioners concede that the statute applied in this case provided discovery only to the prosecution, the rationale behind the statute is clear and hardly contestable—a false alibi is easily manufactured and, absent prior notice, difficult to refute. *People* v. *Holiday,* 47 Ill. 2d 300, 302 (1970). Thus the invalidated statute had a justifiable and necessary governmental purpose. Nor can the respondent reasonably argue that the invalidated statute tended to corrupt or falsify the fact-finding process, or was conducive to incorrect judgments, as would the introduction of a coerced confession or testimony concerning an unfair lineup. As stated by this Court in *Wardius,* the purpose for granting equal and reciprocal discovery of alibi witnesses was to maximize the amount of information available to both parties prior to trial, thus reducing the possibility of surprise. *Wardius,* 412 U.S. at 473. The Court's purpose was thus fairness and equality, not the avoidance of false evidence or corrupt fact-finding. Furthermore, although a defendant was not given advance notice of the identity of the prosecution's alibi rebuttal

witnesses under the invalidated statute, he retained his right to fully cross-examine the witnesses, and further retained his right to demand a continuance at trial on the ground of surprise as soon as the rebuttal witness is called. (See *Williams* v. *Florida,* 399 U.S. 78, 85-86 (1970) on this precise point). Thus the purpose of Wardius was not to correct an error "going to the very integrity of the fact-finding process" (*Linkletter* v. *Walker, supra,* at 639), but rather to provide balance and fairness to pre-trial disclosure.

As to the second of the *Stovall* criteria—the extent of the reliance by law enforcement authorities on the old standards—this Court upheld general notice-of-alibi statutes against the claim that they violated the Fifth Amendment Privilege Against Self-Incrimination in *Williams* v. *Florida, supra,* in 1970, the year following respondents conviction. And in *People* v. *Holiday,* 47 Ill. 2d 300 (1970) the Illinois Supreme Court cited the *Williams* decision by way of upholding the now-invalidated statute, and said:

> "The United States Supreme Court recently addressed the fifth-amendment-right-to-remain-silent issue in the context of a challenge to Florida's notice-of-alibi rule, and concluded that 'the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witness'."
> (47 Ill. 2d at 302; citation omitted)

And *Holiday* was cited as controlling of this case by the Illinois Appellate Court in deciding respondent's direct appeal. *People* v. *Hairston,* 10 Ill. App. 3d 300 (1973). Illinois law enforcement officials thus clearly relied upon this Court's decision in enforcing the now-invalidated statute. At the time of respondent's trial and conviction there was no possible forecasting or apparent adumbration of *Wardius,* which lay hidden some four years in the future.

The final *Stovall* criterion, the effect of retroactive application of the *Wardius* rule upon the administration of justice, surely swings the scales heavily against retroactive application. The federal court system would be flooded with new petitions for relief by state defendants, otherwise properly convicted. Many resulting new trials would certainly result in unjustified acquittals caused only by missing witnesses, lost recollections, and destroyed or irretrievably lost evidence. These consequences cannot be ignored, because they affect the safety of our citizenry, and their continued confidence in the administration of justice.

Finally, it should be noted that respondent was convicted of murder on overwhelming evidence. He was identified as the "shooter" by two eyewitnesses to the crime who had known him well during the previous five years. *People* v. *Hairston, supra,* at 681-682. It is unlikely that respondent's supposed alibi defense would have profited him, in the face of such testimony.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

FOR THE SEVENTH CIRCUIT

Nos. 78-1219, 78-2219

UNITED STATES OF AMERICA, ex rel.
LEROY HAIRSTON,

Petitioner-Appellant,
Cross-Appellee,

VS.

WARDEN, ILLINOIS STATE PENITENTIARY,
STATEVILLE CORRECTIONAL CENTER,

Respondent-Appellee,
Cross-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
The Honorable Bernard M. Decker, *Presiding.*

HEARD DECEMBER 8, 1978—DECIDED APRIL 30, 1979

Before SWYGERT, LAY,* and PELL, *Circuit Judges.*

LAY, *Circuit Judge.* This case presents consolidated appeals from final orders of the federal district court de-

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* The Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, is sitting by designation.

nying petitioner's first application for a writ of habeas corpus (No. 78-1219) and granting petitioner's second application (No. 78-2219).

In 1969 Leroy Hairston, a member of a Chicago youth gang, was convicted for murder and sentenced to 75-100 years in prison following a jury trial in Illinois state court. In pretrial proceedings the petitioner unsuccessfully challenged the constitutionality of the Illinois alibi-notice statute.[1] The conviction was affirmed by the Illinois

1. Ill. Rev. Stat. ch. 38, § 114-14 provides in part:
Upon request of the prosecuting attorney . . . whenever a defendant proposes to offer in his defense, testimony of witness other than himself to establish an alibi, such defendants [sic] shall, not less than 5 days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi, which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense and the names and addresses of the witnesses whom the defendant intends to call to establish such alibi defense. If the defendant intends to offer an alibi by his own testimony he shall, not less than 2 days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi, which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense. The defendant shall not be permitted to introduce evidence inconsistent with such notice unless the defendant establishes to the satisfaction of the court that witnesses to be called and not named in the notice were not known at the time such notice was filed or the court for other good cause permits the notice to be amended. In the event of the failure of a defendant

(Footnote continued on next page)

Appellate Court, and leave to appeal to the Illinois Supreme Court was denied. While his motion was pending before the Illinois Supreme Court the decision of *Wardius* v. *Oregon,* 412 U.S. 470 (1973), declaring the Oregon alibi-notice statute unconstitutional was decided by the Supreme Court of the United States.[2]

Having thus exhausted his state remedies, petitioner filed the first of two applications for a writ of habeas corpus in

(Footnote continued from preceding page)

to file written notice as required in this Section, the court may exclude evidence offered by the defendant for the purpose of proving an alibi, if it appears to the court that such evidence takes the State by surprise.

2. In *Wardius* v. *Oregon* the Supreme Court found:
[T]he Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants.

. . . .

We do not suggest that the Due Process Clause of its own force requires Oregon to adopt [reciprocal discovery] provisions. *Cf. United States* v. *Augenblick,* 393 U.S. 348 (1969); *Cicenia* v. *Lagay,* 357 U.S. 504 (1958). But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.
412 U.S. at 472, 475-76 (footnote omitted).

federal district court. As grounds for relief he asserted that the alibi-notice statute operated to deny him a fair trial, and that his trial was prejudiced by pretrial publicity and references made at trial concerning youth gang warfare in Chicago. Petitioner's counsel filed an affidavit stating that several witnesses could verify petitioner was in a location other than where the murder occurred; that counsel had verified the existence of the alibi witnesses; and counsel believed that any attempt to offer an alibi defense without compliance with the notice of alibi statute would have been futile since the trial court denied petitioner's alternative motions to obtain discovery of the prosecution's case or have the alibi disclosure statute declared unconstitutional. The district court, the Hon. William J. Lynch presiding, granted the writ of habeas corpus, ruling that the *Wardius* decision was to be applied retrospectively to petitioner's case.

On appeal, this court reversed the district court's decision. The court stated:

> [W]e need not consider the retroactivity of *Wardius* because it is clear from the state court record that petitioner was not harmed by application of the Illinois statute.
>
> Petitioner concedes that no alibi evidence was excluded in this case, but he contends that the trial court's ruling on his motion to quash was the equivalent of such exclusion. We disagree.
>
> Petitioner's argument to the state court on the motion to quash was directed primarily at obtaining reciprocal discovery, not only of the state's rebuttal witnesses but also grand jury minutes, police reports and other materials. Petitioner never requested a ruling that any alibi evidence would be excluded if he offered it without complying with the statute. In addition, the statute provides that the court may exclude the evidence. Illinois courts have interpreted this provision to make the decision discretionary with the trial judge. *People* v. *Cline, supra,* 8 Ill. App. 3d at 921. *We cannot conclude, therefore, that had alibi evidence been offered at trial, it would have been excluded.* For this reason, the alibi-notice statute was not unconstitutionally applied in this case.

(Emphasis added.) (Footnotes omitted.)

Because the district court did not address the prejudicial pretrial publicity claim, this court remanded the case to the district court for consideration of this cause.

On remand the district court, Judge Bernard M. Decker presiding, noted that this court limited the remand to consideration of the prejudicial publicity claim and therefore denied petitioner's motion for renewed consideration of the *Wardius* claim. With regard to the merits of petitioner's claim of prejudicial publicity the district court denied the writ. From this order petitioner now appeals (No. 78-1219).

Thereafter petitioner filed a second petition for a writ of habeas corpus again asserting that the right to present alibi testimony was impaired by application of the Illinois alibi-notice statute. The district court, Judge Bernard M. Decker presiding, held that a successive petition was appropriate under the unusual circumstances presented in the case. The court reasoned:

> In support of this motion, the petitioner has filed an affidavit from his trial counsel supplementing the original affidavit filed before Judge Lynch, and an affidavit from counsel for his codefendant. Both affidavits essentially reiterate the belief of counsel that the court had clearly indicated that an alibi defense would not be permitted without compliance with the statute. The supplemental affidavit from Hairston's

trial counsel also refers to his fear that any further attempt to present an alibi defense might subject him to a finding of contempt. The trial court transcript substantiates the claims now asserted by petitioner.

These circumstances appear to place this claim among those which may be heard by the federal courts on successive *habeas corpus* petitions under the standards articulated in *Sanders* v. *U.S.*, 373 U.S. 1, 15 (1963). Successive application of the claim is permissible unless "the ends of justice would not be served by reaching the merits of the subsequent application." The Seventh Circuit has stressed the necessity of a full and fair hearing on the claim on the first application. *U.S. ex rel. Townsend* v. *Twomey*, 452 F. 2d 350 (7th Cir. 1972). The district court opinion presents strong grounds for a conclusion that this claim, *i.e.*, that it would have been futile to seek to formally raise the alibi defense at trial, was never given full consideration by Judge Lynch.

The district court significantly added in footnote 2:

> The petitioner was of course, *in no position to object to the failure of Judge Lynch to give full consideration to all the issues relating to the claim that he was hurt by the trial judge's position on the alibi statute.* Since Judge Lynch granted the writ, there was no apparent necessity to do so, nor could the petitioner bolster the record on appeal.

Memorandum Opinion and Order, Sept. 8, 1977 (No. 75 C 1079). (Emphasis added.)

Judge Decker granted the writ. The State now appeals from this order.

We first consider petitioner's claim that he was denied due process by pretrial publicity and prejudicial references to youth gangs during his state trial.

Prior to defendant's trial there was a significant amount of news media attention given to violence caused by street gangs in Chicago. None of the media coverage, however, specifically mentioned defendant Hairston. A review of the voir dire examination of prospective jurors fails to reveal any suggestions that the jury was biased against the defendant in particular or against his connection with any street gangs. *See Murphy* v. *Florida*, 421 U.S. 794 (1975).

Hairston contends, however, that the pretrial publicity, when coupled with references made at trial to his gang membership and that of his victim and the prosecutor's closing remarks concerning the evils of gang activity in general, was prejudicial. We agree with the district court that the evidence shows a relation between gang activity and motive for the killing. Upon review of the overall record we find the trial court did not abuse its discretion in ruling that the probative value of the street gang evidence outweighed the danger of undue prejudice.

We turn now to the challenge relating to the Illinois alibi statute. We initially note that the State does not challenge the district court's conclusion that renewed consideration of the *Wardius* claim was permissible in the successive habeas petition under the standards promulgated in *Sanders* v. *United States*, 373 U.S. 1 (1963). Because the facts surrounding the *Wardius* issue were not explored in an evidentiary hearing when the first petition was filed, we agree with the district court that renewed consideration was appropriate. *See Townsend* v. *Sain*, 372 U.S. 293, 313 (1963).

Turning to the merits of the *Wardius* claim, the State argues that the proscriptions set forth in *Wardius* cannot be violated unless the defendant offers an alibi defense at trial and the defense is excluded. In the instant case,

the defendant made no attempt to offer alibi evidence at trial. Accordingly, the State contends

> since *Wardius* forbids enforcement of alibi rules absent reciproval discovery, there can be no attempt to enforce the rule until the defense is offered and excluded and the holding of *Wardius* does not apply to this set of facts.

The federal district court rejected this argument based upon the following statement made by the state trial court judge during the hearing on defendant's motion for reciprocal discovery:

> THE COURT: I don't think you have a problem there because if you don't comply with [the notice of alibi statute] you will not be able to use your alibi witnesses. . . .

The federal district court concluded:

> From the evidence presented at the hearing, it is evident that the unconstitutional alibi-notice statute was applied to force the petitioner to choose between complying with the notice requirement and presenting his defense without the reciprocal disclosure of rebuttal witnesses, or foregoing his opportunity to present his defense at all. Both this petitioner and the defendant in *Wardius* chose not to comply with the statute. The only difference between that case and this is that here the court ruled prior to trial that all alibi evidence would be excluded whereas in *Wardius*, the court did not rule until an alibi witness had already been called. This difference cannot be significant.

We agree. The state trial court judge expressly stated that defendant would not be able to use alibi witnesses at trial if he did not comply with the notice of alibi statute. This is precisely when was condemned in the *Wardius* de-

cision.[3] *See Wardius* v. *Oregon*, 412 U.S. at 475-79. The federal district court determined after a hearing that the defendant did have a bona fide alibi defense. This finding is supported by evidence introduced at the hearing and we find it not clearly erroneous.

Finally the state contends *Wardius* should not be applied retroactively. The district court found that *Wardius* should be applied retroactively since the defendant's inability to present his alibi defense undermined the fact-finding process. We agree. *See Stovall* v. *Denno*, 388 U.S.

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3. In support of its argument that alibi witnesses must be offered and excluded at trial before *Wardius* is applicable, the State relies on *Green* v. *Fogg*, 422 F. Supp. 1034 (S.D. N.Y. 1976) and *United States ex rel. Snyder* v. *Mack*, 372 F. Supp. 1077 (E.D. Pa. 1974). Both of these cases are readily distinguishable. In *Green* the defendant complied with the alibi notice statute but the government failed to provide reciprocal discovery. The sole rebuttal witness used by the government was an expert meteorologist who testified on the basis of public weather reports about the weather conditions existing in the area in which defendant claimed to have been during the commission of the crime. The federal court held no violation of due process occurred "where [the] rebuttal evidence involves solely scientific facts as immutable as a weather report." 422 F. Supp. at 1036. In *Snyder* the defendant unjustifiably delayed in informing his counsel of possible alibi witnesses until after the prosecution had finished its case-in-chief. Given this attempt to raise such an eleventh-hour defense "the trial court [was presented] with a set of circumstances that clearly justified the denial of the continuance" requested by defendant so that his counsel could *investigate* a possible alibi defense. 372 F. Supp. at 1080-81.

293, 297-98 (1967); *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); *Martin* v. *Wyrick*, 568 F. 2d 583 (8th Cir. 1978).

The judgment of the district court granting a writ of habeas corpus is AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION
FOR THE NORTHERN DISTRICT OF ILLINOIS

LE ROY HAIRSTON,
Petitioner,

vs.

WARDEN, ILLINOIS STATE PENITENTIARY, et al.,
Respondents.

NO. 77 C 3705

MEMORANDUM OPINION AND ORDER

This case is now before the court for a final determination on the second petition for a writ of habeas corpus. The petitioner, Le Roy Hairston, was convicted of murder and sentenced to a term of 75-100 years following a jury trial in the Circuit Court of Cook County, Illinois. The conviction was upheld on direct review by the Illinois Appellate Court, *People* v. *Hairston*, 10 Ill. App. 3d 678 (1st Dist. 1973); the Illinois Supreme Court denied leave to appeal, 54 Ill. 2d 594 (1973). The instant petition for a writ of habeas corpus sets forth the single claim that the petitioner was denied a fair trial because an unconstitutional alibi-

notice statute") was applied to prevent him from presenting alibi evidence.

The first petition, filed on April 4, 1975, asserted two grounds for relief: that the trial was tainted by pre-trial

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1. Ill. Rev. Stat. ch. 38, § 114-14 provides in part:

"Upon request of the prosecuting attorney . . . whenever a defendant proposes to offer in his defense, testimony of witness other than himself to establish an alibi, such defendants [sic] shall, not less than 5 days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi, which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense and the names and addresses of the witnesses whom the defendant intends to call to establish such alibi defense. If the defendant intends to offer an alibi by his own testimony he shall not less than 2 days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi (which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense. The defendant shall not be permitted to introduce evidence inconsistent with such notice unless the defendant establishes to the satisfaction of the court the witnesses to be called and not named in the notice were not known at the time such notice was filed or the court for other good cause permits the notice to be amended. In the event of the failure of a defendant to file written notice as required in this Section, the court may exclude evidence offered by the defendant for the purpose of proving an alibi, if it appears to the court that such evidence takes the State by surprise."

publicity, and that the alibi-notice statute denied him a fair trial. Judge Lynch granted the writ on the petitioner's motion for summary judgment as to the alibi-notice issue. This decision was based on *Wardius* v. *Oregon*, 412 U.S. 470 (1973), which invalidated an alibi-notice statute because it did not provide reciprocal disclosure of alibi rebuttal witnesses by the government. *United States ex rel. Hairston* v. *Warden*, 407 F. Supp. 524 (N.D. Ill. 1976). *Wardius* was decided while the petitioner's motion for leave to appeal to the Illinois Supreme Court was pending.

On appeal, the Seventh Circuit reversed Judge Lynch's decision on the ground that the state record did not show that the petitioner was harmed by application of the alibi-notice statute. The case was remanded to this court for determination of the second ground for relief.[2]

After denial of the petitioner's motion for renewed consideration of the alibi-notice issue, see memorandum opinion and order, September 8, 1977, case No. 75 C 1079, the instant petition was filed. By this petition, the plaintiff seeks renewed consideration of his claim that application of the unconstitutional alibi-notice statute denied him a fair trial.

By memorandum opinion and order dated February 28, 1978, the court ruled that this was a proper case in which to permit successive habeas corpus petitions because this claim had not been given "full and fair hearing" on the first petition, *see Sanders* v. *United States*, 373 U.S. 1 (1963); *U.S. ex rel. Townsend* v. *Twomey*, 452 F. 2d 350 (7th Cir. 1972). No full hearing was held on the first petition for the simple reason that Judge Lynch decided the case on a motion for summary judgment. The court held that the petitioner would be permitted to present whatever

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2. The petition was eventually denied by memorandum opinion and order dated December 5, 1977.

evidence he may have on the question whether he was harmed by application of the admittedly unconstitutional statute.[3]

Accordingly, a hearing was held on April 14, 1978. Witnesses were presented by both the petitioner and the respondent. Marshall Patner (trial counsel for the petitioner, testified that his client told him that at the time of the murder, he was with five friends, at a center at 67th Street, and at another location. This is substantiated by notes made at the interviews. Mr. Patner testified that although he does not recall everything done in preparation of the defense, he does recall extensively interviewing one of the people named by the petitioner, and at last contacting a second. In addition, Mr. Patner testified that he considered the alibi defense "strong" in that there were a number of witnesses, but also vulnerable in that the witnesses were friends of the petitioner's, and the murder involved rival street gangs. For the reason, Patner was concerned that rival gang members might step forward as rebuttal witnesses, and that pre-trial disclosure of the identities of the alibi witnesses might subject them to harassment.

Prior to trial, the state filed a request for notice of alibi defense pursuant to the alibi-notice statute. The petitioner moved to quash the request, or in the alternative, for reconsideration of a previous denial of the petitioner's motion for discovery against the state. In a memorandum in support of this motion, the petitioner argued that it is unfair to require the defendant to disclose his alibi defense without reciprocal disclosure by the state. The

3. *See People* v. *Cline*, 19 Ill. App. 3d 446 (Fourth Dist. 1974), *affirmed*, 60 Ill. 2d 561 (1975).

trial court rejected this claim and ruled that the petitioner must either comply with the notice requirement or forego the opportunity to present evidence of an alibi:

> "THE COURT: . . . You make a very novel argument but I can't see it and from my standpoint I have denied it. Now let's take it from there."
>
> (Mr. Patner and counsel for the co-defendant then clarified their arguments and expressed concern that they would not be able to preserve their objections for appeal.)
>
> "THE COURT: I don't think you have a problem there because if you don't comply with it you will not be able to use your alibi witnesses and I don't think you waive it so far as review is concerned."

Following this ruling, the petitioner's co-defendant complied with the notice requirement and was permitted to present an alibi defense. The petitioner elected not to comply with the request and thus did not present alibi evidence. Patner explained that this approach was taken in part because he was afraid that he would lose the objection on appeal if he did comply with the statute and in part because he thought that it was such a close case that the alibi defense might work to the petitioner's detriment unless they were able to prepare for rebuttal witnesses.

The respondent has made much of the petitioner's failure to make a formal offer of proof. Although this would have made the question of proof considerably easier on this petition, there is no absolute requirement that an offer of proof be made. Patner testified that he did not make an offer of proof because it did not seem necessary in view of the court's statement that the petitioner would not be able to present the alibi defense, and also because the cir-

cumstances of the case made him hesitant to disclose specific names for fear of stirring up greater hostility between the rival gangs involved.

From the evidence presented at the hearing, it is evident that the unconstitutional alibi-notice statute was applied to force the petitioner to choose between complying with the notice requirement and presenting his defense without the reciprocal disclosure of rebuttal witnesses, or foregoing his opportunity to present his defense at all. Both this petitioner and the defendant in *Wardius* chose not to comply with the statute. The only difference between that case and this is that here the court ruled prior to trial that all alibi evidence would be excluded whereas in *Wardius*, the court did not rule until an alibi witness had already been called. This difference cannot be significant.

Thus, the only question is whether *Wardius* should be retroactively applied to this case. This question was expressly reserved in the Seventh Circuit's decision on the first petition. The general rule is that a doctrine is to be retroactively applied if the harm impaired "the very integrity of the fact-finding process," *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); *see also*, *Williams* v. *United States*, 401 U.S. 646 (1971).

In his decision on Hairston's first petition, Judge Lynch found that the unfairness imposed by alibi-notice statutes does frustrate the fundamental balance of a fair trial, and thus that *Wardius* should be applied retroactively, 407 F. Supp. at 528-529. This is particularly true when the harm is not merely the lack of reciprocal disclosure, but also, as in this case, the inability to present an alibi defense; *compare People* v. *Bush*, 352 N.Y.S. 2d 936 (1973), *with People* v. *Morales*, 372 N.Y.S. 2d 25 (1975 and *Allison* v. *State*, 214 N.W. 2d 437 (Wis. 1974).

In this case, the petitioner's inability to present his defense, or at least his untenable choice between foregoing his defense and presenting one vulnerable from attack without notice undermined the integrity of the entire fact-finding process. *Wardius* should be applied retroactively in such a case.

Accordingly, the court hereby orders that a writ of habeas corpus shall issue and that the petitioner shall be released from custody if he is not afforded a new trial within 120 days.

ENTER:

BERNARD M. DECKER,
United States District Judge.

DATED: August 25, 1978.